

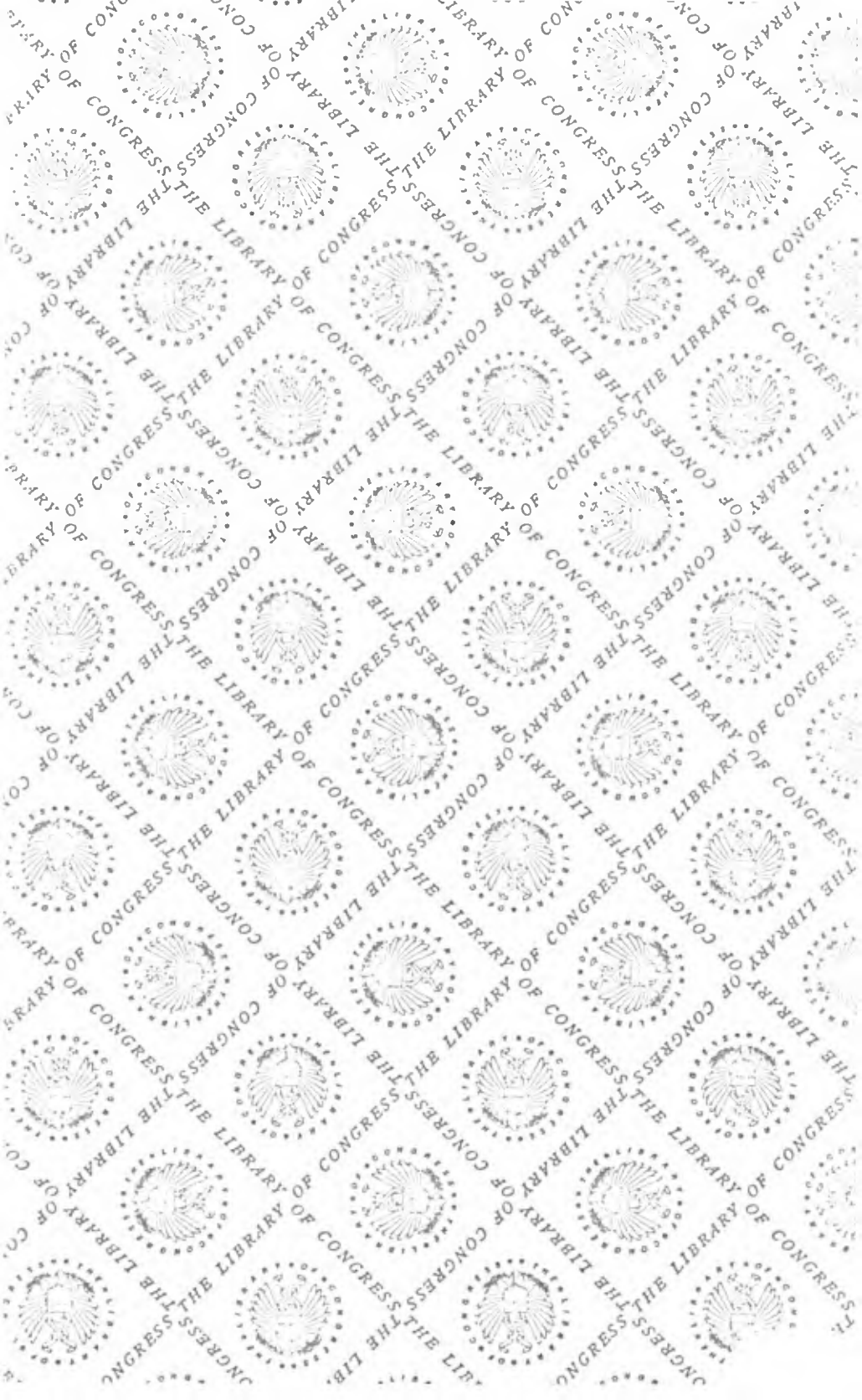
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No. 3





RULES FOR REVIEW OF DECISIONS OF THE TAX
COURT OF THE UNITED STATES

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HEARING

BEFORE

SUBCOMMITTEE NO. 3

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

EIGHTY-THIRD CONGRESS

SECOND SESSION

ON

H. R. 1067

A BILL TO AUTHORIZE THE SUPREME COURT OF THE
UNITED STATES TO MAKE AND PUBLISH RULES FOR
PROCEDURE ON REVIEW OF DECISIONS OF THE TAX
COURT OF THE UNITED STATES

JANUARY 28, 1954

U.S. Congress, House
Printed for the use of the Committee on the Judiciary

Serial No. 9



UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1954

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¹ Elected to committee Mar. 30, 1953 (H. Res. 194). Hon. Joseph R. Bryson, of South Carolina, a member of this committee, died on Mar. 10, 1953.

² Elected to committee Jan. 21, 1954 (H. Res. 412). Hon. Clifford P. Case, of New Jersey, a member of this committee, resigned from Congress on Aug. 13, 1953.

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no. 9



RULES FOR REVIEW OF DECISIONS OF THE TAX COURT OF THE UNITED STATES

THURSDAY, JANUARY 28, 1954

HOUSE OF REPRESENTATIVES SUBCOMMITTEE No. 3
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to notice, at 10 a. m. in room 346, Old House Office Building, the Honorable Kenneth B. Keating (chairman of the subcommittee) presiding.

Present: The Honorable Kenneth B. Keating.

Also present: Mr. William R. Foley, counsel.

Mr. KEATING. The subcommittee will come to order.

The subcommittee has before it for consideration H. R. 1067, a bill to authorize the Supreme Court of the United States to make and publish rules for procedure on review of decisions of the Tax Court of the United States.

(H. R. 1067 is as follows:)

[H. R. 1067, 83d Cong., 1st sess.]

A BILL To authorize the Supreme Court of the United States to make and publish rules for procedure on review of decisions of The Tax Court of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 131 of title 28 of the United States Code be amended by adding at the end thereof a new section, as follows:

"§ 2074. Rules for review of decisions of The Tax Court of the United States.

"The Supreme Court may prescribe, and from time to time amend, uniform rules for filing petitions, preparation of records, and the practice, forms, and procedure in the United States Court of Appeals in proceedings for review of decisions of The Tax Court of the United States.

"Such rules shall neither abridge nor enlarge the substantive rights of any litigant.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported."

SEC. 2. The chapter analysis of chapter 131 of title 28 of the United States Code immediately preceding section 2071 is amended by adding at the end thereof the following:

"2074. Rules for review of decisions of The Tax Court of the United States."

Mr. KEATING. Now, we have scheduled for hearing this morning H. R. 1067. The three witnesses we have here are all from Washington.

Are there any witnesses here who are not from Washington who wish to be heard?

Both Mr. Crumpacker and Mr. Willis have engagements and I wonder if it would be an inconvenience to either Mr. Tuttle or Mr. Mersch or Mr. Ivins, if we scheduled this for a different date of hearing.

Mr. IVINS. Mr. Chairman, I think we can cover the whole thing in 10 minutes.

Mr. KEATING. Well, we will proceed.

Mr. IVINS. I do not think Mr. Mersch really wants to be heard.

Mr. KEATING. Then we will proceed with the hearing of H. R. 1067, a bill to authorize the Supreme Court of the United States to make and publish rules for procedure on review of decisions of the Tax Court of the United States.

We will hear first Mr. Elbert P. Tuttle, General Counsel for the Department of the Treasury.

Mr. TUTTLE. Thank you, Mr. Chairman.

STATEMENT OF ELBERT P. TUTTLE, GENERAL COUNSEL, DEPARTMENT OF THE TREASURY

Mr. TUTTLE. Mr. Chairman, my statement will be very short and as Mr. Ivins says, it should only take a moment. We have already expressed our views in a letter as favoring the proposal.

Mr. KEATING. Would you like to make that part of the record?

Mr. TUTTLE. We would approve it.

(NOTE.—This letter follows Mr. Tuttle's testimony.)

Mr. Driscoll of our office is with me to answer any questions the committee may wish to ask.

It is my understanding that the bill is to provide for uniformity of procedure by allowing the Supreme Court to adopt rules to that end for the 11 separate courts of appeal.

There is 1 Tax Court; and rules with respect to appeals differ according to the 11 courts of appeal. This bill would permit and authorize the Supreme Court to adopt rules which would make the practice uniform no matter which court of appeal was involved. That is my understanding of it. I do not believe any more is involved than that. We believe it would be a great aid to have this uniformity of rules.

I have no more to add to it. If a question should come up, I should like Mr. Driscoll to be available for comment.

Mr. KEATING. The late Honorable Chief Justice Vinson has expressed his opposition to this. Are you familiar with that fact?

Mr. TUTTLE. I do recognize that there is no uniformity of rules in the courts of appeals with respect to appeals from the district courts in their several areas. But I think there is a difference in that there are many separate district courts; whereas here we are dealing exclusively with appeals from one Tax Court.

I do not know the basis of the former Chief Justice's view except maybe the fact that it has not been made applicable to appeals in general.

On the other hand, the Supreme Court may provide uniform rules in some areas.

Mr. DRISCOLL. Mr. Chairman, I am associated with the General Counsel's Office of the Department of the Treasury.

As Mr. Tuttle was saying, the Supreme Court does have authority to adopt uniform rules of procedure in two areas, in the district courts and in admiralty courts.

The bill would enact an additional provision, following those two provisions, allowing the Supreme Court also to establish uniform rules on appeals from the Tax Court.

The present provisions relate only to the procedure within the district courts and not to appeals from the district courts.

Mr. KEATING. The last paragraph of the late Chief Justice Vinson's letter says:

The Court feels it should not be called upon to act in this rulemaking which has been rightfully left to the courts of appeal * * *.

This does not apply to courts of appeal. This is only the Tax Court.

Mr. TUTTLE. The rules referred to are rules of the court of appeals in respect of appeals taken from the Tax Court. The court of appeals do not have uniform rules with respect to appeals from the district courts because there are 11 areas—11 circuits where the courts of appeal sit. Each of these 11 courts reserves the right to have its rules on appeals from its own district courts.

On the other hand, there is only one Tax Court and one tax bar and appeals are had from the Tax Court to any one of the 11 circuits. The same rules ought to prevail in each jurisdiction, from one court to another.

The rules have already been made uniform, as Mr. Driscoll points out, with respect to cases in admiralty courts.

Mr. DRISCOLL. I believe that is the procedure in the admiralty courts. Certainly, as to procedure in the district courts, that uniform rules are prescribed by the Supreme Court.

Mr. TUTTLE. The Supreme Court has adopted rules for the operation of all district courts in their own field. He is not speaking of appeals from the district court. The Supreme Court of the United States has adopted uniform rules for district courts. The bill would add the authority to adopt them with respect to appeals from the Tax Court to the court of appeals.

Mr. KEATING. Have they adopted uniform rules with regard to appeals from all tribunals?

Mr. TUTTLE. Not all.

Mr. KEATING. This would be something new?

Mr. TUTTLE. Yes. But it is the only situation where we can think now, where appeals now lodged do come from a single nationwide tribunal like the Tax Court.

I should modify that. There are appeals on decisions and rules by various commissions and boards directed to the courts of appeals. I would not want to be recorded as having said that there may not be cases somewhat parallel to this situation.

There is an interesting article, Mr. Chairman, on this subject at page 743 of the August 1950 magazine called Taxes that points out the tremendous divergence in the various circuits with respect to these appeals. That may be important for the consideration of the committee.

Mr. KEATING. Would you make that available to us?

Mr. TUTTLE. We would be very glad to hand this document in for that purpose.

Mr. KEATING. We will not need that at this point. Thank you, Mr. Tuttle and Mr. Driscoll.

Mr. Victor S. Mersch, clerk of the Tax Court of the United States.

Mr. MERSCH. It would save your time, Mr. Chairman, if you heard Mr. Ivins who is here from the American Bar Association.

Mr. KEATING. Mr. Ivins.

Mr. IVINS. Thank you, Mr. Chairman.

(The letter from the Department of the Treasury, mentioned by Mr. Tuttle, follows:)

THE SECRETARY OF THE TREASURY,
Washington, D. C., July 6, 1953.

HON. CHAUNCEY W. REED,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

MY DEAR MR. CHAIRMAN: Further reference is made to the request of your committee for the views and recommendations of this Department concerning H. R. 1067, a bill which would authorize the Supreme Court to make and publish rules for procedure in review of decisions of the Tax Court of the United States.

H. R. 1067 would add section 2074 to chapter 131, title 28, United States Code, to authorize the Supreme Court to prescribe rules for practice and procedure in the courts of appeals for review of decisions of the Tax Court. It would be specifically provided that substantive rights of a litigant shall neither be abridged nor enlarged by these rules, which would be reported to the Congress by the Chief Justice to take effect 90 days thereafter.

The evident purpose of H. R. 1067 is to provide uniformity of procedures in the courts of appeals for review of Tax Court decisions. At the present time each of the several circuits prescribes its own procedural rules for review of Tax Court decisions. Such procedures differ considerably in the several circuits with respect to such matters as the requirements for admission to practice, the form and contents of petitions for review, the method of transmittal of the record, the portion of the contents of the record to be transmitted, and the time for printing and filing of the record. Enactment of H. R. 1067 should result in elimination of these differences.

The language utilized in H. R. 1067 is patterned to a large extent after that appearing in title 28 United States Code, section 2072, authorizing the Supreme Court to prescribe procedural rules for district courts, and follows closely the language adopted in title 28, United States Code, section 2073, authorizing the Supreme Court to prescribe rules of procedure for admiralty courts. The major omission in H. R. 1067 from the provisions of sections 2072 and 2073 is a paragraph repealing generally laws inconsistent with the rules and preserving the form of rules previously prescribed by the Supreme Court. Such paragraph provides as follows:

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

In order to avoid possible ambiguity in construction, and to preserve the statutory framework of sections 2072 and 2073 it is recommended that this paragraph be added at the end of section 1 of the bill.

In view of the foregoing, this Department favors enactment of the above-proposed legislation.

The Director, Bureau of the Budget, has advised the Treasury Department that there is no objection to the presentation of this report.

Very truly yours,

M. B. FOLSOM,
Acting Secretary of the Treasury.

**STATEMENT OF JAMES S. Y. IVINS (WASHINGTON, D. C.), IN
BEHALF OF THE AMERICAN BAR ASSOCIATION, SECTION OF
TAXATION, IN SUPPORT OF H. R. 1067, H. R. 1523, S. 856, AND
S. 965**

Mr. IVINS. Mr. Chairman, under the Internal Revenue Code, when the Tax Court of the United States renders a decision, a petition for review by the United States court of appeals, in the proper circuit, may be filed by the losing party.

Although there is only one Tax Court, there are 11 courts of appeals, and the rules in the 11 circuits providing for procedure on review, are

all different. In 1947 and 1948 the Attorney General recommended to the Judicial Conference of Senior Circuit Judges that the courts of appeals adopt uniform rules.

In the fall of 1949 clerks in the Tax Court, attorneys in the Appellate Division of the Office of the Chief Counsel, Bureau of Internal Revenue and attorneys in the Tax Division of the Department of Justice suggested the desirability of a recommendation by the American Bar Association that the rules for review of Tax Court decisions be made uniform in the 11 circuits. In 1950 a committee of the American Bar Association prepared a report showing the great divergence in the rules in the 11 circuits. This report is reproduced in *Taxes*—the tax magazine for August 1950, pages 743-760, a copy of which is attached to this memorandum.

The report of the bar association committee was called to the attention of the Judicial Conference at its 1950 meeting and again the Attorney General urged upon the Conference the adoption of uniform rules. No action, however, was taken by the Conference.

The bar association's committee brought in a report at the 1951 convention of the American Bar Association recommending legislation which would permit the Supreme Court to make uniform rules with respect to review of Tax Court decisions in the 11 circuits.

It was thought that this was the proper way to proceed because Congress had previously authorized the Supreme Court to make uniform rules of civil procedure and uniform rules of criminal procedure for the United States district courts, and the Supreme Court had done so through the process of appointing committees of the bar to prepare drafts.

The American Bar Association authorized the section of taxation to recommend enactment of legislation.

The above numbered bills, which are all alike, have been introduced by members of both parties in both the Senate and the House to reflect the nonpartisan nature of the proposed legislation.

This legislation has been approved by the Department of Justice, the Treasury Department, and the Bureau of the Budget.

The burden on the Supreme Court would, of course, be very much less than that which was imposed upon its members by the acts providing for the rules of civil procedure and the rules of criminal procedure—because a set of uniform rules for proceedings on review of Tax Court decisions need not be very voluminous. The Supreme Court could undoubtedly get the assistance, without expense to the Government, of lawyers in the Government and lawyers who regularly represent taxpayers in reviews of Tax Court decisions, to prepare a uniform set of rules, which would most likely consist of a selection of the best parts of the existing rules in the different circuits.

The remarks of the Attorneys General before the Judicial Conference appear in the reports of the Judicial Conference of Senior Circuit Judges for 1947, page 4; 1948 page 10; 1950 page 38.

The clerks in the Tax Court have to prepare records to go to 11 courts and the people in the Bureau of Internal Revenue have to prepare records for all 11. I was talking in the clerk's office in the Tax Court in 1949 about what the bar association was doing about some things and the lady who has charge of the records asked me why the bar association did not do something about this horrible confusion

in the court of appeal rules. I passed that on to the chairman of the section and he appointed me to go out and look into it.

I first went to the Department of Justice and found Mr. Locke who is here. If you wish to ask him any questions he will be pleased to deal with them. He prepared a condensation of the rules in the various circuits and had recommended to the Attorney General that he ask the courts to make their rules uniform.

Then I went to Mr. Marshall in the Internal Revenue, Chief Counsel's Office. He is here, too, this morning. I prepared a report to the bar association which Mr. Tuttle referred to paralleling in tables and columns the rules for two purposes: one was to give the bar a handy textbook to which they could quickly check when they were taking an appeal and know what they had to do in the different circuits.

I may say since that report, the Sixth Circuit of the Court of Appeals had made a complete amendment of its rules to bring it into conformity with those of the third, fourth and fifth circuits. The seventh and ninth circuits have gone far in that direction.

The first thing we did was to have the American Bar Association prepare this report. We called it to the attention of the Judicial Conference but they did nothing. The Attorney General went back to the Conference in 1950 and again urged them to do something and again they did nothing.

Then we got the mandate from the bar association.

We had complete confusion in the district courts of the United States by reason of an old scheme of conformity. That was found to be so terrible it finally authorized the Supreme Court to make rules there.

I was told with respect to the late Chief Justice Vinson that his objection was probably that it would make additional work for the Supreme Court but that he justified it by saying it ought to be in the field of the Circuit Courts.

It is true. If a court of appeals makes a decision on a question of law the Supreme Court leaves that in the jurisdiction of that court. But if there is conflict the Supreme Court gets right in and instructs them and there is no sound reason why that could not be done here.

It will not be extra work for them. Mr. Justice Clark arranged uniformity rules on the circuit courts. He did not ask for legislation. He assigned the Conference to adopt uniform rules. If this bill were passed I think the Supreme Court could very well designate Mr. Justice Clark as a committee. He could designate some members of the bar in the Department of Justice and some in the Internal Revenue Service and some in the bar association and they could take the rules of the 11 circuits, sit down and pick out the best without trying to write anything new at all.

I do not think there would be any conflict between counsel for the Government and counsel for the taxpayers. Then the Supreme Court could put their O. K. on it and send it along.

Mr. KEATING. Thank you, Mr. Ivins.

Mr. IVINS. Mr. Mersch, clerk of the Tax Court, and Mr. Marshall from the Revenue Service, and Mr. Locke from the Department of Justice are here to back me up.

Mr. KEATING. I have no questions unless any one of these gentlemen wish to be heard.

STATEMENT OF HOWARD P. LOCKE TAX DIVISION, DEPARTMENT OF JUSTICE

Mr. LOCKE. I have no desire to prolong the hearing but I merely want to say that shortly after the Federal rules of civil procedure were adopted we recognized there should be some uniformity with respect to review of decisions of the Tax Court. As Mr. Tuttle has pointed out, that is only one court. The law at that time provided that the circuit courts of appeal could adopt rules for review of the Tax Court decisions before the rules of civil procedure were adopted.

A committee composed of Mr. George Maurice Morris of the American Bar Association, a representative from the Bureau of Internal Revenue and one from our office tried to draw up an acceptable set of uniform rules with respect to review of decisions of the Tax Court.

Unfortunately the suggestions made by that committee were not adopted universally by the various circuit courts of appeal. The result is that we have almost 11 different sets of rules for review of the decisions and in 1947 I compiled a set of rules showing the wide divergence so far as review was concerned. While we recognized it was unfortunate in handling the cases on appeal we knew the taxpayer must be just as adversely affected as we were.

After that compilation of the rules was drawn up, and I suppose largely because of my insistence that they should be uniform, the matter was presented to the Attorney General and was laid before the Judicial Conference. We were immensely happy when the bar association endorsed it because it was a recognition then on the other side of the necessity for some uniformity.

I think the bill presented is probably based upon the bill which suggested the recommendation of rules for the district courts which went through and had the final approval of the Supreme Court.

We feel it is extremely important that the rules be made uniform so the confusion will not exist that exists today. It is true there are some difficulties in handling cases in the courts which are negligible. The major need of getting a case into the appellate court concerns what goes into the record. That is extremely important with reference to the case and that is why we are behind this legislation.

Mr. KEATING. Thank you very much, Mr. Locke.

The letter addressed to the chairman of the committee by Mr. William P. Rogers, Deputy Attorney General, favoring the enactment of the bill will be inserted in the record at this point.

(The letter referred to follows:)

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
May 21, 1953.

HON. CHAUNCEY W. REED,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice concerning the bill (H. R. 1067) to authorize the Supreme Court of the United States to make and publish rules for procedure on review of decisions of The Tax Court of the United States.

The bill would authorize the Supreme Court to prescribe uniform rules of procedure in the United States courts of appeals in proceedings for review of decisions of the Tax Court of the United States. The bill would provide that such rules shall neither abridge nor enlarge the substantive rights of any litigant and that they shall not take effect until the expiration of 90 days after reported to Congress by the Chief Justice.

At the present time, the courts of appeals in the 11 circuits have varying rules of procedure governing the review of Tax Court decisions. It is understood that the proposed legislation originated in the Section on Taxation of the American Bar Association and has the support of the association.

This Department conducts approximately 400 tax cases each year in the courts of appeals. The Department's experience with the present divergent rules of the various courts of appeals relating to reviews of decisions of the Tax Court indicates the need for the promulgation of uniform rules in that respect. It is believed that the enactment of the measure would result in economies of time and effort. Accordingly, the Department of Justice favors the enactment of the bill.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

WILLIAM P. ROGERS,
Deputy Attorney General.

Mr. KEATING. Mr. Mersch, do you wish to be heard?

Mr. MERSCH. Thank you, Mr. Chairman.

STATEMENT OF VICTOR S. MERSCH, CLERK, TAX COURT OF THE UNITED STATES

Mr. MERSCH. At the suggestion of Chief Judge John W. Kern, I appear to advise the committee that, in view of the fact that our cases come from all over the country, that they are handled by counsel from all the States, and not necessarily from the State out of which the case arises; and not necessarily by counsel familiar with the rules of the court of appeals in which the case would be heard, the work of the clerk of the Tax Court of the United States would be immeasurably simplified and aided by uniform rules applicable to the 11 circuits.

I think it should be said that we are not here with any gripe as to the rules of any circuit. We have not failed to carry out our functions under the existing situation. But that work would be much more readily and much more easily performed under uniform rules.

Mr. KEATING. You are not overawed by the position of the Supreme Court of the United States?

Mr. MERSCH. For the reason, Mr. Chairman, that I would assume that the position of the Chief Justice is based upon the work to be imposed upon the Supreme Court—a matter that I have not within my purview.

Mr. DRISCOLL. Mr. Chairman, Mr. Tuttle asked before he left to call your attention to the present law, section 141 (c) (2) which provides that,

The courts of appeal shall each adopt their own rules for appeal from the Tax Court.

In view of this provision it would be very important if a bill were enacted that contained the provision we are suggesting at the end of the bill which would have the effect of overriding 141 (c). In that connection we have suggested a paragraph be added to the bill so that any laws that do not comply with the rules would have no further effect upon the promulgation of the Supreme Court rules.

(The suggested paragraph is as follows:)

All laws in conflict with such rules shall be of no further force and effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Mr. KEATING. We will take into consideration the wording of the bill.

Does anyone else want to be heard in connection with H. R. 1067? If not, the hearing is concluded.

(Whereupon the hearing was concluded and the meeting adjourned.)
(The following was submitted for the record:)

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF THE CHIEF JUSTICE,
Washington 13, D. C., April 28, 1953.

HON. CHAUNCEY W. REED,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.*

DEAR MR. REED: I am replying to your letter of April 17 in which you ask for an expression of opinion on H. R. 1067, a bill to authorize the Supreme Court of the United States to make and publish rules for procedure on review of decisions of the Tax Court of the United States.

The Court considered this bill at its last conference.

Section 2071 of the Judicial Code now provides each court of appeals with the power to promulgate rules of procedure, not inconsistent with acts of Congress or rules prescribed by this Court.

In addition to this general rulemaking power, the courts of appeals are specifically authorized, by 26 U. S. C. section 1141 (c) (2), to adopt rules for the filing of petitions and records and for the conduct of proceedings to review decisions of the Tax Court. Thus, courts of appeals have traditionally promulgated rules of procedure governing the cases before them, and proceedings to review decisions of the Tax Court constitute no exception to this practice.

Although the courts of appeals adopt rules of procedure governing review of cases coming from Federal administrative tribunals, it may be of interest to note that the United States Code (5 U. S. C. sec. 1041) specifically provides the several courts of appeals with authority to promulgate rules governing the practice and procedure in cases coming from certain named agencies and executive departments—Federal Communications Commission, the Secretary of Agriculture, Maritime Commission, Maritime Board, and Maritime Administration—and provides further that these rules must be "approved" by the Judicial Conference of the United States.

The Court feels that it should not be called upon to act in this rulemaking field which has regularly been left to the courts of appeals. Those courts are better adapted to determine, upon the basis of actual experience, the particular procedural problems in this field, and to fashion rules designed to meet those problems.

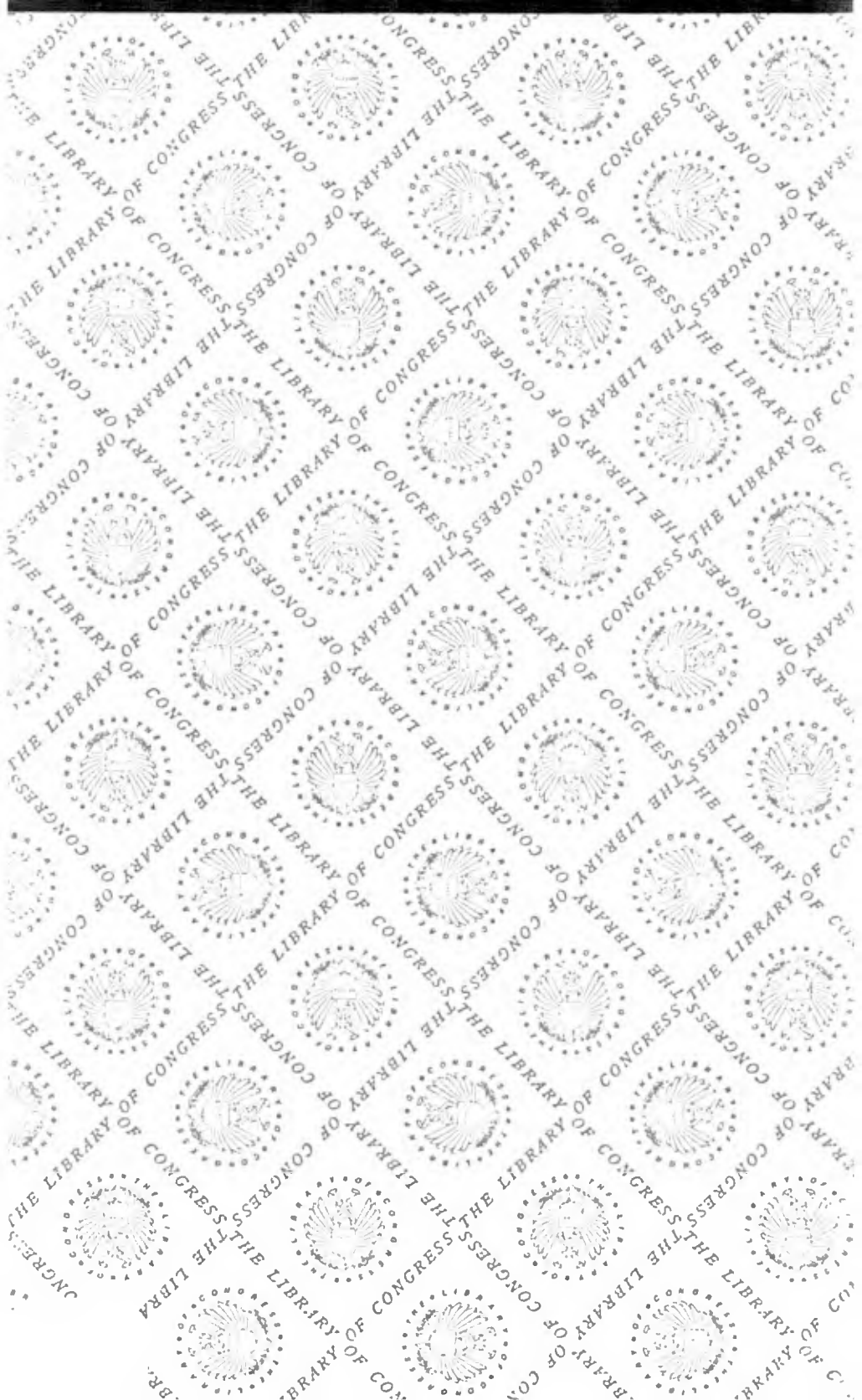
Sincerely,

FRED M. VINSON.

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